

Proposal to Present at the Constitutional Law Scholars Forum

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Title: The Constitutionality of Mandating Editorial Transparency

Abstract:

We're in the middle of an ever-growing campaign by regulators to "fix" user-generated content (UGC) on the Internet. For regulators, their simplest "fix" would be to simply tell Internet services what UGC they must and must not publish. However, the simple option isn't available. First, such content-specific edicts are unconstitutional censorship; and second, there is partisan gridlock over the optimal quantity of UGC.

To bypass these problems, regulators are increasingly embracing "transparency" as a policy alternative to hold "Big Tech" accountable. Transparency can take many forms, but the gist is to impose mandatory disclosure obligations on Internet services about their editorial operations and decisions with respect to UGC. For example, in 2021, two states, Florida and Texas, passed laws imposing extensive and wide-ranging mandatory disclosures on "social media platforms."

Among other purported benefits, proponents view mandatory disclosure laws as raising fewer, and less serious, constitutional concerns than other regulatory interventions. After all, mandatory disclosure laws are ubiquitous in our society, they often survive constitutional scrutiny, and disclosure requirements don't tell Internet services what UGC they can or cannot publish.

This Article challenges the prevailing view that regulators can impose mandatory disclosure obligations about Internet services' editorial operations and decisions. It highlights a specific but underappreciated problem: how the mandatory disclosures will be confirmed for accuracy. If a regulator seeks to confirm the accuracy of any disclosures about an Internet service's editorial operations or decisions, the associated investigation and discovery requests will have obvious chilling effects on those editorial processes; plus any evidence turned over to the regulator may be misused for additional unconstitutional purposes. The constitution does not permit regulators to peer so deeply into the editorial processes of any publisher, including Internet services.

In other words, the push for transparency seemingly offered a constitutionally permissible alternative to outright censorship, but it instead suffers from its own intractable constitutional defects. Thus, despite near-universal support for transparency options, they are probably a policy dead-end.

Bio:

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Keywords: constitution, social media, free speech, First Amendment, transparency, mandatory disclosures, compelled speech, censorship